CRIMINAL APPEAL No.153 OF 1988(DB)

Against the judgement and order dated 17-3-1988 passed by Sri Tarkeshwar Pd. Singh, Additional Sessions Judge, XII, Munger in Sessions Case no. 18 of 1986.

Kundan Mahto
Ramanand Mahto @ Ramanand Mahto---------- --(Appellants)
Laxmi Mahto

Versus

The State of Bihar ----------(Respondent)

For the appellants: - Mrs. Anjana Prakash, Sr. Adv.
Mr. Shivendra Kumar Sinha, Adv.
Mr. Rakesh Kumar Sinha, No.1, Adv

For the State: - Mr. Lala Kailash Bihari, Sr. Adv. & A.P.P

P R E S E N T

THE HON'BLE MR. JUSTICE SUDHIR KUMAR KATRIAR

THE HON'BLE MR. JUSTICE MADHAVENDRA SARAN

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M. Saran,J This appeal has been preferred against the judgment and order dated 17.3.1988 passed by the learned Additional Sessions Judge, XII, Munger, in Sessions case no. 18 of 1986, corresponding to G.R. no. 1217/84, whereby and where-under the three appellants have been convicted u/ss 302/34 of the Indian Penal Code and have been sentenced to undergo R.I for life.

2. The incident which has given rise to present criminal proceedings took place in the night of 21.12.1984, at the basa of Ram Subhag Choudhary situated in Katghara bahiyar. Informant Upendra Choudhary (PW3) lodged fard bayan on 22.12.1984, at 10. 30 AM, before S.I Nandu Sharma of Gogri police station, alleging therein that in the previous night at about 9 PM, he, his elder brother, Tribeni Choudhary (deceased), and his younger brother Sudama

Choudhary, took their meals at the basa. Thereafter his younger brother, Sudama Choudhary went to sleep at the nearby Bathan and Tribeni Choudhary went in the southern room of the basa. The informant gave one Bidi to him. The informant also started smoking Bidi and taking heat from the oven in the northern room of the basa. In the meantime, some persons came and enquired "basa par kaun hai". The informant's brother, Tribeni Choudhary, replied "Ham Tribeni Choudhary Hain". The informant then heard sound of firing. He came out of the room with a torch light and identified all the three appellants fleeing away towards south but he did not identify the remaining 2-3 persons. The informant raised alarm upon which the persons of nearby basa and bathan named Sudama Choudhary and Mahesh Roy came. They all started searching Tribeni Choudhary as after gun firing Tribeni Choudhary was not in the basa. After great search, they found Tribeni Choudhary lying dead in pool of blood at a distance of 20-25 yards south from the said basa in the raicha field. They saw gun shot injury on the back near the shoulder of the deceased. All the three kept watching the deceased for whole night and in the morning the informant went to his Bhagina Ram Subhag Roy and informed him about the incident and returned back to the deceased and in the meantime the police also arrived. The informant further stated that he lives at the basa of Ram Subhag Roy for the last 20 years and looks after cultivation etc. of his land and of his Bhagina. The motive behind the occurrence is said to be that the deceased was negotiating with one Ram Chandra Roy (DW1) for exchange of latter's land in the same bahiyar with the land of Ram Subhag Roy. There was basa of the accused on the said land of Ram Chandra Roy and the accused persons also cultivated his land on batai. So, they did not like the exchange and for this

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they committed the murder of deceased. The Investigating Officer after recording the fard bayan of the informant prepared the inquest report and sent the dead body for post-mortem and after completing investigation submitted charge sheet. After cognizance the case was committed to the Court of Sessions. The accused/appellants faced the trial and were convicted and sentenced as mentioned above. It appears that appellant Laxmi Mahto is father of the appellant Kundan Mahto, and appellant Ramanand Mahto is said to be a member of the same family.

3. The defence of the accused appellants was total denial of the alleged occurrence and false implication in the case. Their further defence as evidenced from the suggestion given to the prosecution witnesses was that deceased had gone to ease in south of his basa in the late hours of night and either the informant himself with a view to grab the land of the deceased or some other person with some other motive had fired upon the deceased from the back where he died. The appellants examined one witness in support of their defence.

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4. The sole question now arises for consideration is whether the prosecution has been able to establish the case against the appellants beyond all reasonable doubt.

5. To substantiate the charge, the prosecution examined in all nine witnesses in the case. PW1, Krishna Deo Mishra, is a witness of the inquest report. The inquest report was prepared in his presence by S.I., Nandu Sharma (PW9), over which he and Awadh Kishore Roy put their signatures. Inquest report is Exhibit-1. The seizure list exhibit-2 of blood stained earth was also prepared in his presence. PW2, Sudama Choudahry is the other brother of the informant

who came to the place of occurrence on hearing sound of firing and learnt about the occurrence. PW3, Upendra Choudhary, is the informant. PW4 Mahesh Kumar Roy also arrived at the place of occurrence on hearing the sound of firing and learnt the names of the appellants. PW5 Ram Subhag Roy is the Bhagina of the informant. PW6 is Dr. Ramanand Kumar who performed the post-mortem examination on the body of the deceased, Tribeni Choudhary. PW7 Rajendra Prasad is a formal witness who has proved the fard bayan exhibit-5 and formal FIR exhibit-6. PW8 Awadh Kishore Roy is another witness on the inquest report. PW9 S.I. Nandu Sharma is the investigation officer. The defence also examined one witness named Ram Chandra Roy, DW1. The appellants, however, did not produce any documentary evidence in support of their case.

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6. PW8 Dr. Ramanand Kumar on 23.12.84 was posted as Civil Assistant Surgeon at Sadar Hospital, Khagaria. On the same day at 10.30 AM he performed the post-mortem examination over the dead body of Tribeni Choudhary and found two ante-mortem injuries on his person;

(i) One circular wound of one cm diameter, margin of the wound was inverted, at the right scapular region. It was wound of entrance;

(ii) One lacerated wound size 3 cmX2 cm X2 cm at the right side of chest, margin of the wound was everted and at places torn. It was the wound of exit.

Both the injuries according to doctor were deep, damaging the skin muscle and upper part of right pleura and lungs, upper part of lung was

perforated and the brain substances was pale. Stomach contained digested food materials about three ounce. Liver, spleen and kidney were pale. The death according to him was due to shock and hemorrhage as a result of above mentioned injuries. Time elapsed since death was 30 to 48 hours. The post-mortem report is exhibit-4. He further stated that both injuries were communicating one. He did not find any undigested food in the stomach. According to him, the food taken is digested within 3-6 hours. Now the question is who caused the above injuries on the person of the deceased and in what manner the same were caused.

7. Informant PW3 Upendra Choudhary is the most import witness of this case. He had not seen the actual part of murder but has claimed to have seen the appellants when they were fleeing away towards south with the help of torch light. He further stated that he, his brother Tribeni Choudhary, and Sudama Choudhary (PW2), lived at the basa of their Bhagina of Ram Subhag Roy in Katghara bahiyar and looked after his cultivation. They have their own lands also in the said diyara. He stated that on the date of occurrence at about 8-10 PM, he was near the oven in the northern room of basa. His brother deceased Tribeni Choudhary was in the southern room. Tribeni Choudhary asked him to provide a bidi and so he lighted bidi and gave it to him. He returned back to his room and started heating his body from the oven. After some time some persons came and out of them one asked “basa par kaun hai”. His brother Tribeni Choudhary replied “main Tribeni Choudhary hoon”. Thereafter he heard sound of firing. He lighted the torch and came out. He identified the accused/appellants in the light of torch. He, however, could not identify other two persons. The appellants then fled away. He raised alarm

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upon which Sudama Choudhary and Mahesh Roy came and to whom he narrated the names of the appellants identified by him in the flash of torch. All the three then began to search Tribeni Choudhary. After some time they found the dead body of Tribeni choudhary lying in the raicha field at a distance of 20-25 yards in the south from the basa. All the three kept watching the dead body for the whole night and in the morning the informant went to village Katghara to inform his Bhagina Ram Subhag Roy and informed him about the incident. The informant returned back to the basa. The police arrived at the place of occurrence and recorded fard bayan of the informant. According to this witness the deceased was negotiating with one Ram Chandra Roy for exchange of latter's land with the land of Ram Subhag Roy and over the land of Ram Chandra Roy the accused had their basa. The accused were cultivating the said land of Ram Chandra Roy on batai and this was the reason for the murder of the deceased. He identified the accused Laxmi Mahto and Kundan Mahto present in the dock and claimed to identify the other accused named Ramanand. In cross examination this witness stated that police officer did not ask him to give the torch so he did not give the same to him. He could not say from which side and from what distance from the basa he had heard the voice of the accused. He did not identify the accused from their voice. He has denied the suggestion that he himself killed his brother due to his greed over his land.

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8. PW2, Sudama Choudhary, is the other brother of the deceased. He stated that on the date of occurrence at about 10-11 PM, he was at his bathan. He heard sound of firing. He also heard alarm of Upendra Choudhary (PW3). He came to the basa of Ram Subhag Roy. Upendra Choudhary informed him that he had identified the three appellants in the flash of torch. Then they began to

search Tribeni Choudhary and after some time they found him severely injured in the raicha field. He further stated that as he reached the basa, Mahesh Roy (PW4) also arrived there. In cross-examination, he stated that his brother deceased Tribeni Choudhary was living at the basa of Ram Subhag Roy since last 20 years. He further stated that he has six bighas of land at Katghara diyara which is at a distance of one and half rassi from the basa of Ram Subhag Roy. He had small basa at a distance of 300-400 yards in the south from the place of occurrence where he used to keep his cattle and on the alleged night he was sleeping there. Then according to this witness there is one basa of Ramakant Roy at a distance of 700 yards in south of the place of occurrence where on the night of occurrence Mahesh Roy (PW4) was sleeping. He further stated that he reached at the place of occurrence first and then within two minutes Mahesh Roy also arrived there.

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9. PW4 Mahesh Kumar Roy is the other witness who reached the place of occurrence after hearing alarm of Upendra Choudhary. He stated that on the night of occurrence he was at the basa of Ramakant Roy which is at a distance of two rassi from the basa of Ram Subhag Roy. He heard sound of gun shot. He also heard alarm of Upendra Choudhary. On hearing the alarm, he went to the basa of Ram Subhag Roy. The informant told him that he had identified the appellants in the flash of torch. They began to search Tribeni Choudhary and found his dead body lying in the raicha field in the south of the basa. In cross-examination, he has admitted that Ram Subhag Roy is of his caste. He has denied the suggestion of defence that before police he did not claim that informant told him that he had identified the three appellants in the flash of torch. On the one hand, he asserted that informant had told him that he

identified the three appellants in the flash of torch.

10. PW5 Ram Subhag Roy is the Bhagina of the informant. He stated that his maternal uncle, Tribeni Choudhary, and the informant were looking after his cultivation in Katghara diyara since last 25 years. They lived at his basa. He further stated that in the morning of 22.12.1984, he learnt from the informant that in the previous night Tribeni Choudhary was murdered at his basa by gun shot and that the informant had identified all the three appellants as the killers. Then he came to his basa in Katghara diyara and saw the dead body of the deceased lying in the raicha field. According to this witness, Laxmi Mahto had his basa in Katghara diyara on the land of Ram Chandra Roy and he was cultivating his land on batai. This witness wanted to exchange the land of Ram Chandra Roy with his own land and in the said negotiation the deceased was involved. He, however, admitted that in connection with such exchange of land he never talked to Ram Chandra Roy.

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11. PW9 Nandu Sharma is the investigating officer of the case. He stated that on 22.12.84, at 8.30 AM, he heard that a murder had been committed in Katghara diyara. On the basis of such information, he came to the place of occurrence. He recorded the fard bayan of Upendra Choudhary. He prepared the inquest report exhibit-1 of the deceased in the presence of the witnesses. He inspected the place of occurrence. He found the dead body at a distance of 20—25 yards in south of the basa in question in raicha filed. He found large quantity of blood fallen near the dead body. He also found blood fallen near the southern room of the basa at a distance of one cubit from the room and trail of blood connecting the two points up to the raicha field. He prepared seizure list exhibit-2 of the blood stained earth. He stated that basa in question

consists of two rooms one in the north and other in the south. Both rooms faced east. The blood was found in front of the southern room on the earth. In the southern room he found husk kept, whereas in the northern room he found oven and domestic articles. The raicha filed was at a distance of 10 cubits. He found raicha crop near the dead body in damaged condition. He then found one more basa at a distance of 100 yards south west from the place of occurrence basa. He found one bathan at a distance of 150 yards in east south from the place of occurrence. He admitted that he did not see the torch nor the same was seized by him. He further stated that informant had not stated before him that Laxmi was armed with pistol.

12. There is no direct evidence in this case. Nobody has seen the actual murder. The case is based on circumstantial evidence. It is the informant only who had seen the appellants in the torch light while they were fleeing away. It is admitted position that informant and the deceased were living in the basa in question and were looking after the cultivation of Ram Subhag Roy. PWs 2 and 4 both claimed to have heard the sound of firing and on their arrival at the place of occurrence they were told by the informant the names of the accused persons. PW4 at the time of gun firing was at the nearby basa of Ram Chandra Roy situated at a distance of few yards whereas PW2 was at his bathan which is at a distance of 150-200 yards. They are the only two persons who reached the place of occurrence after hearing the sound of firing and alarm raised by the informant. It appears from the evidence of the I.O that they were at a comfortable distance from where they could have heard the sound of firing and reached the place of occurrence. No enmity has been shown with PW4. He appears to be quite independent witness.

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13. It has been contended on behalf of the appellants that there is no eye witness of the actual murder. The occurrence took place in the month of December which was winter season. There is evidence that it was dark night and informant has claimed to have seen the accused persons in the torch light but the same was neither produced before the I.O, nor the I.O seized the same. Learned counsel further contended that in the fard bayan the informant has claimed to have identified the accused persons while they were fleeing away but in evidence he stated that he saw the accused persons while they were standing. Learned counsel, thus, contended that identification of the appellants is doubtful. Learned counsel in support of his contention that non-seizure or non-production of torch makes the whole story of identification in the night doubtful, and placed reliance on a decision of this court reported in 2000(1) PLJR, 86, Mashidas & Ors vs the State of Bihar.

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14. It has been seen above that occurrence took place at the basa of informant. Admittedly it was dark night and in the basa of PW3 only two persons were present one is the informant and other is deceased. The I.O (PW9) did not find many basas in the vicinity of the place of occurrence. One basa where PW2 was sleeping or staying, and the other basa which was of Ramakant Roy in which PW4 was sleeping. The basa in question, therefore, was at a lonely place. Therefore, it was the informant only who could have seen the accused and identified them. PWs 2 and 4 are the only two persons who reached the place of occurrence after hearing the sound of firing and alarm of the informant. Therefore, in such a situation it would not be expected that the prosecution could have examined more persons in the case as witnesses. PW4 as stated above appears to be an uninterested man and the

appellants have failed to show that he had any grievance against the appellants or any affinity or relationship with the informant. It is true that torch in question was not produced in the court nor the same was seized by the police. There is evidence of PW3, the informant, that as the I.O did not ask him to produce the torch so he did not produce the same. PW3 appears to be an illiterate person. It is not expected that he would know the technicality of law. There is nothing in the evidence on record to show that the I.O had demanded the torch from the informant. No such question was put to him by the appellants. Therefore, it has to be accepted that the same was not demanded by him from the informant. PWs 2, 3 and 4 have identified the appellants in court. It is not the case of the appellants that they were not known from before to the informant. It cannot be accepted that no person could be identified in dark night when he is at a convenient distance. Such being the position, identification of the appellants by PW3 is not doubtful.

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15. It has further been contended that on behalf of the appellants that it is the prosecution case that after hearing the sound of firing the informant came out of the northern room and identified the accused persons in torch light but he did not see the deceased coming out of the room or going towards raicha field. He further contended that the FIR and evidence of PW3 suggest that the shot would have hit on the chest of the deceased but in the evidence the prosecution witnesses clearly stated that the shot hit in the back of deceased which was entry of the shot and the other wound was exit of the shot. He further contended that doctor has clearly stated that no undigested food was found in the stomach of the deceased. According to the doctor the food taken is digested within 3-6 hours. She, thus, contended that manner of occurrence

as alleged is not at all possible.

16. The I.O (PW9) has found blood at two places, namely, where the dead body was found and also at one cubit in east from the southern room. He has also found a trail of blood throughout on the ground between the said two points. It appears that the deceased on hearing call of the accused immediately came out of the room and on seeing them he became frightened and so, he turned right and started running away towards south to save him. It further appears that the accused fired at him soon near the southern room which hit in the back. The doctor, as mentioned above, has found that the bullet damaged skin muscle, upper part of right pleura and lungs. So, the bullet did not cause any injury to the heart. It appears that after receiving the gun shot injury, the deceased in order to save his life in panic ran up to the raicha field and fell down on the ground and died. Therefore, the deceased received the shot near the southern room of the basa. This is the reason why the informant could not see the deceased coming out of the room and running towards raicha field in the south. It further appears to me that on hearing the sound of firing at the lonely place of the basa, the informant must have become apprehensive of some danger to his life and so, he came out of the room after watching for a while and taking precaution and by that time the deceased became invisible from the basa. Had the deceased received gun shot injuries at the place where the dead body was found, then there would have been no question of finding trail of blood between the two points by the I.O. So far as the doctor's finding that he found three ounce of digested food in the stomach of the deceased is concerned, evidence on record may be seen. According to the doctor, the food taken is digested within 3-6 hours. The informant says that deceased had taken

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his meals at about 9 PM. The informant was heating his body till 10 PM when the deceased asked for Bidi which the informant gave to him and then returned back to northern room. Then at para 13 the informant stated that after one hour of his giving Bidi to the deceased he heard sound of firing. PW2 Sudama Choudhary has also referred the time of his hearing of sound of firing as 11 PM. PWs 2, 3 and 4 are all rustic persons. They are not expected to state the time accurately. Their statement with respect to the time may vary by an hour or so. According to Modi's Medical Jurisprudence and Toxicology, the process of digestion in normal, healthy persons may continue for a long time after death. So, there is no discrepancy between doctor's evidence and the evidence of prosecution witnesses with regard to the time of occurrence and the evidence on record does not show that the occurrence took place in the late hours of night.

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17. Learned counsel for the appellants further contended that the prosecution has failed to establish the motive of the occurrence as mentioned in the fard bayan. In this connection, he referred to the evidence of DW1, Ram Chandra Roy, whose land was under negotiation for exchange with the land of Ram Subhag Roy (PW5). Let us examine the evidence of DW1 to find out the correctness of the appellants stand. DW1 stated in court that basa of the accused was never over his land in Katghara diyara. He has denied that he had ever any talk with deceased Tribeni Choudhary with respect to exchange of his land in the said diyara with the land of Ram Subhag Roy. He, however, has not denied that he has got land in Katghara diyara near or round about the place of occurrence. As mentioned above, it is the prosecution case that land of this witness which was the subject of exchange and over which the accused

had basa situated in south of the place of occurrence. The I.O (PW9) had found the basa at a distance of 100 yards in south from the place of occurrence. From the evidence of DW1, it appears that he has given a tutored statement to suit the defence version- otherwise, why the informant would introduce false story of exchange of land for the purpose of motive of the occurrence.

Learned counsel for the State pointed out that the motive lies in the heart and mind of the person. He contended that question of motive is not material where there is direct evidence of the acts of the accused and where the acts themselves are sufficient to disclose their intention.

No doubt the motive pleaded is quite weak one but there is no reply to unshaken testimony of PWs 2, 3 and 4 who have no reason whatsoever to implicate the appellants falsely.

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18. Thus, from the evidence on record it is established beyond doubt that on the date and time of the occurrence, the informant (PW3) heard the sound of firing and when he came out of the basa he saw and identified the three appellants along with 2-3 others and thereafter the appellants fled away. The deceased was found missing from the basa in question and thereafter PWs 2, 3 and 4found him lying dead at a distance of few yards in south in the raicha field with fire arm injury. The appellants, thus, in furtherance of common intention of all, jointly committed the murder of deceased Tribeni Choudhary. The circumstances as observed by the learned court below do not only point out their criminality but also quite incompatible with their innocence. The court below has rightly accepted the evidence of the prosecution and I find no good reason to differ with the findings of the court below.

19. In the facts and circumstances of the case, I find no merit in the appeal. The appeal is, accordingly, dismissed. The judgement of the trial court is hereby affirmed. The bail bonds of the appellants are cancelled and they are directed to be taken into custody to serve out the remaining period of sentence. The appellants are directed to surrender in the trial court forthwith.

(M. Saran, J.)

I agree.

S. K. Katriar,J.

(S. K. Katriar, J.)

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Patna High Court
The 23 September,08
NAFR/BKS